PEARL HILL SDN. BHD.

v.

TRIKKON CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[ORIGINATING MOTION NO. 40 OF 1983]
20 APRIL 1984

ARBITRATION: *Award of Arbitrator - Application to set aside or remission to Arbitrator - Whether award bad on face of it - Award a "non-speaking" award - No affidavit exhibiting award - Whether any other affidavit evidence admissible - Failure to deal with all matters - Whether constituted "misconduct".*

The motion was taken out by the applicant for an order that the award of the Arbitrator regarding a dispute arising out of a contract to construct some houses in Penang be set aside or remitted for the reconsideration of the Arbitrator. The application was based on two grounds: first, that the award was bad on the face of it as the Arbitrator had erred in fact and in law in making it, and secondly, that the award did not deal with all the matters referred to the Arbitrator for his decision. The applicant relied on the affidavit of its administrative manager.

Held:

A. The applicant fails on the first ground.

[1] As the award was a "non-speaking" award and there was no affidavit exhibiting the award, the affidavit of the administrative manager was inadmissible for the purpose of showing that the award was bad on the face of it.

[2] In the circumstances, therefore, the applicant had not shown to the satisfaction of the Court that the award was bad on the face of it. There was nothing whatsoever on the face of the award indicating any error of law on the part of the Arbitrator. (in *re Allen & Matthews' Arbitration* [1971] 2 QB 518; *James Clarke (Brush Materials) Ltd. v. Carters (Merchants) Ltd.* [1944] KB 556; *Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.* [1963] 1 QB 201).

B. The applicant fails on the second ground too.

[1] As there were no specific matters referred to the Arbitrator for him to make any specific finding, it was perfectly in order that the award should not deal separately with the two issues of the claim and counterclaim. The Arbitrator had acted as he was entitled to do in the circumstances. *(Jewell v. Christie & Ors.* [1867] LR 2 CP 296).

[2] There was no ground to suggest that there was any misconduct as provided by s. 24 (2), Arbitration Act, on the part of the Arbitrator. A Court ought not to set aside an award on the ground of misconduct unless it is clear that the award was improperly made.

[Motion dismissed.]

Cases referred to:

James Clark (Brush Materials) Ltd. v. Carters (Merchants) Ltd. [1944] KB 566
Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd. [1963] 1 QB 201
Jewell v. Christie & Ors. [1867] LR 2 CP 296

Legislation referred to:
Arbitration Act 1952, s. 24(2)

Other source referred to:
Halsbury's Laws of England, 4th Edn., Vol. 2, para. 622

For the applicant - N. G. Sivanandan; M/s. Presgrave & Matthews
For the respondent - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku

JUDGMENT

Mohamed Dzaiddin J:

This motion was taken out by the applicant for an Order that the Award of the Arbitrator given on 25 July 1983 be set aside or remitted for the reconsideration of the Arbitrator. The dispute arose out of a contract dated 4 January 1979 made between the applicant and the respondent in respect of the construction of 15 units of double storey detached houses on Lots 2742 and 1666 Tanjung Bungah, North East District, Penang. On 12 April 1983, Mr. Lai Lok Kun of Kumpulan Karim-Lai, Kuala Lumpur was appointed the Arbitrator. The application was based on two grounds, namely:

(1) That the Award was bad on the face of it as the Arbitrator has erred in fact and in law in making this Award;

(2) That the said Award did not deal with all the matters referred to the Arbitrator for his decision.

Mr. Sivanandan, Counsel for the applicant relied on the affidavit of Ooi Sim Cheong, the administrative manager of the applicant company affirmed on 10 September 1983 in support of his application. Paragraph 8 of the affidavit referred to the grounds why the Arbitrator had erred in law. Annexed to his affidavit were the various documents which included so far as they are material to this application, the appointment of Arbitrator (Exhibit 'OSC1'), order of direction (Exhibit 'OSC2'), pleadings (Exhibit 'OSC3') consisting of the statement of claim, defence and counterclaim, reply and defence to counterclaim and most important, the Award (Exhibit 'OSC4').

When this matter came up for argument on 20 February 1984, Mr. Mahinder Singh Dulku, Counsel for the respondent raised a preliminary objection. He submitted that this Court cannot look at the affidavit evidence in deciding whether the Award is bad on the face of it as the Award of the Arbitrator in the present case was a "non-speaking" Award.

The Award (Exhibit 'OSC4') stated as follows:

BE IT KNOWN that I award:

1. The sum of Ringgit Two Hundred Eighty Nine Thousand Four Hundred and Ten & Cents Twenty Eight Only (RM289,410.28) to be paid by the respondent to the Claimant in full settlement of all claims by each of the said parties against the other and of all matters in difference between them within thirty days (30) from date of this award.

2. The sum of Ringgit Forty Thousand Five Hundred and Seventeen & Cents Forty Only (RM40,517.40) to be paid by the respondent to the Claimant as interest within thirty days (30) from date of this Award.

3. That the respondent shall pay the total costs of this arbitration which amount to Ringgit Eight Thousand Seven Hundred & Seventeen Only (RM8,817).

4. That the respondent and Claimant shall each bear their own costs of reference.

LAI KOK KUN (Arbitrator).

Dated this 25 July 1983.

The above Award is termed as a "non-speaking" Award because it merely recorded what the Arbitrator had decided. There was no reference to any documents, nor were they incorporated in the said Award.

Having considered the authorities on this issue it was my finding that as this was a "non-speaking" Award and that there was no affidavit exhibiting the Award, any other affidavit evidence would be inadmissible for the purpose of showing that the Award was bad on the face of it. In the circumstances, I allowed the objection of Mr. Mahinder Singh. That being the position, the applicant had not shown to the satisfaction of this Court that the Award of the Arbitrator was bad on the face of it. Indeed, Mr. Sivanandan had rightly conceded that he could not rely on the affidavit evidence.

For an authority on this issue, I would refer to the decision of Mocatta J in *re Allen & Matthews' Arbitration* [1971] 2 QB 518. The headnote read as follows:

> A dispute having arisen as to the rent of an agricultural holding, the landlord requested a reference to arbitration but, as he and the tenant could not agree on the appointment of an arbitrator, the Minister appointed an arbitrator pursuant to Schedule 6 to the Agricultural Holdings Act 1948. At the hearing before the arbitrator evidence was given as to a new drainage system installed by the tenant mainly at his own expense. The arbitrator assessed the annual rent at £2,325. The tenant's solicitor requested him to state his reasons for his decision in accordance with s. 12(1)(a) of the Tribunals and Inquiries Act 1958 and he did so, but neither in the award nor in the reasons did he make any mention of the new drainage system.
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> On the tenant's application to set aside the award on the ground that it contained an error of law upon its face, since the drainage system had improved the rental value of the farm and the arbitrator had failed to state in his reasons that he had disregarded the improvement to the property when making his award as he was bound to do under s. 8(2)(a)(i) of the Agricultural Holdings Act 1948:-
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> **Held,** refusing the application, that the Court could not find that there was an error of law on the face of the award without referring to affidavit evidence as to the drainage system; but that, since the affidavits were not incorporated in the award, they were not admissible and, accordingly, there was nothing on the face of the award to indicate an error of law.

In *James Clark (Brush Materials) Ltd. v. Carters (Merchants) Ltd.* [1944] KB 566 Tucker J said, at p. 568:

> To succeed on this motion the buyers must show that there is a decision of law patent on the face of the award, and that that decision is necessarily wrong. As the result of the authorities, where parties choose to go to arbitration - and more especially, I would emphasise, where they arbitrate before a lay arbitrator, and agree to accept his decision - and they do not ask for a case to be stated on a point of law which arises during the arbitration - as they are entitled to do - they cannot complain if they get something which may not appear to them to be justice unless they substantiate the very stringent grounds on which an award can be remitted or set aside for error of law appearing on the face of it ... It is my duty to look at the award in the way most favourable to its preservation, and looking at it from that angle, I find it impossible to say, because the arbitrator has not set out these facts, that they have not been proved to his satisfaction.

Then, there was another well-known case of *Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.* [1963] 1 QB 201, where the question of the extreme difficulty of making reference to documents not themselves incorporated in the award was emphasized. On the issue being to what extent parties could refer to the contract itself which was not set out in the award, Diplock LJ said, at p. 217:

> The principle of reading contracts or other documents into the award is not, in my judgment, one to be encouraged or extended, and in my view we are not entitled in this Court, on an award where there is a purely general reference to 'the contract' - and a reference only in that part of the award which deals with the consequences of the finding of fact - to look at the contract and search it in order to see whether there is an error of law.

Following the decision in *re Allen & Matthews' Arbitration*, I am therefore precluded from looking at the affidavits in this case, other than the affidavit exhibiting the Award, which was none. Such being the case, there is nothing whatever on the face of the Award indicating any error of law on the part of the Arbitrator. In my judgment, the applicant fails on his first ground.

On the second ground i.e. that the Award did not deal with all matters referred to the Arbitrator, Mr. Sivanandan, Counsel for the applicant referred to paragraph 2 of the written submission of the applicant's former Counsel which contained the points in issue which the Arbitrator should have enquired into. It was further submitted that the Arbitrator in arriving at his decision in the Award (Exhibit 'OSC4') had failed to consider the applicant's counterclaim and reply, thereby arriving at the figure being the full settlement of all claims less than the amount which the respondent had claimed in their statement of claim. It was contended that the Arbitrator had misconducted himself in which circumstances this Court had a statutory discretion to set the Award aside. Section 24(2) of the Arbitration Act 1952 states that where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the Award aside. It is recognized that it is difficult to give an exhaustive definition of what constitutes 'misconduct'. *Halsbury's Laws of England*, 4th Edn. Vol. 2 para. 622, says that:-

> The expression is of a wide import. But misconduct occurs, for example, if the arbitrator or umpire fails to decide all the matters which were referred to him.

The question asked in the present case is this: Has the Arbitrator failed to deal with all the matters referred to him? The unfortunate part here was that the parties, having agreed to the order of direction (Exhibit 'OSC2') did not subsequently file the agreed points of issue, thus leaving the matters of dispute wide open. However, it is clear that both parties who were represented by Counsel during the arbitration proceeding did put in written submissions on the various points of dispute for the deliberation of the Arbitrator. I have considered both written submissions to see whether they contained anything requiring the Arbitrator to make separate findings on the issues. In my opinion, there are no specific matters referred to the Arbitrator for him to make any specific finding. Therefore, following the principles in *Jewell v. Christie & Ors.* [1867] LR 2 CP 296, it is clear that, in the absence of special circumstances requiring that matter should be dealt with separately, it is perfectly in order that the award should not deal separately with the two issues of the claim and the counterclaim. It does appear to me upon looking at the Award (Exhibit 'OSC4') the Arbitrator merely made one lump sum award "in full settlement of all claims by each party against the other and all matters in difference between them". I am of the opinion that the Arbitrator in dealing with all the

matters referred to him had considered them when making his decision. I think he was entitled to do so in the circumstances. This Court ought not to set aside the Award on the ground of misconduct unless it is clear that it was improperly made. In my judgment, there is no ground to suggest that there was any misconduct in this respect. This notice of motion is therefore, dismissed with costs.

Also found at [1984] 2 CLJ 191